

**IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)b)
OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3**

Between:

Q. R.,

the petitioner

And:

**Thomas J. Burke
Attorney General and Minister of Justice and Consumer
Affairs**

The Minister

RECOMMENDATION

FACTS:

1. This referral arises out of a request for information filed on January 19th, 2007 with the Minister of Justice and Consumer Affairs and Attorney General. The petitioner resides out of province and sought information pertaining to recent amendments to the Human Rights Code which included political belief and activity as a new ground of discrimination.
2. The petitioner requested from the Minister “any documents pertaining to the inclusion of political belief or activity into the New Brunswick Human Rights Act (Chapter H-11). The time frame for these requested documents is from January 1, 2002 until January 31 2005.”

3. The Minister responded to the request by way of letter dated February 7, 2007. The Minister's response states in relevant part as follows:

Section 2 of the Act states:

Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any department to which this Act applies.

Subsection 5(1) of the Act states:

5(1) An appropriate Minister may only deny a request for information or a part thereof in accordance with subsection 4(4) and section 6 and where that Minister denies a request for information he shall, in writing, advise the applicant of the denial stating the reasons for such denial and shall provide the applicant with the necessary forms for a review under this Act.

Section 6 states:

6 There is no right to information under this Act where its release

(f) would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

(g) would disclose opinions or recommendations for a Minister or the Executive Council;

Request denied under section 6:

After a review of documents kept or filed in this Department as well as the Office of the Attorney General, because your letter was also addressed to me in that capacity, your request is denied on the basis that there is no right to such information as the release would disclose legal advice or opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business, or would disclose opinions or recommendations for a Minister of the Executive Council.

...

Please note that you may want to communicate with the Department of Post-Secondary Education, Training and Labour, as that Department is responsible for the *Human Rights Act*.

4. On April 27, 2007, the petitioner filed a request for Review of the Minister's response with my office. On June 27, 2007 a meeting with Departmental officials was held to conduct an *in camera* review of the files requested, pursuant to

section 7(4) of the Act. However, at that meeting officials in the Attorney General's office asserted a claim of solicitor client privilege and refused to disclose any records for review by my office. It is not clear from the Attorney General's submissions which records were subject to exemption under paragraph 6 (f) as opposed to subsection 6(g). Presumably all records were deemed subject to the 6(f) exemption since no records were made available for review under subsection 7(4).

5. Officials from the Attorney General's Office did agree however to produce a general description of documents relevant to the applicant's request that are kept or filed in that Office and subject to their claim of solicitor client-privilege. Two days later, on June 29, 2007, the Attorney-General forwarded the following list of records:

Legislative Services File

- (1) Several drafts of a Memorandum to the Executive Council ("MEC") on the subject of amendments to the *Human Rights Act*, with solicitor's notes on some pages, together with client research and opinion analysis attached thereto; as well as a Memorandum to the Executive Council dated March 16 2004 with related legal opinion dated March 15, 2004 attached thereto, all provided by client to solicitor for the purpose of rendering a legal opinion on the content of the MEC.
- (2) Series of e-mails from October 8, 2004 to October 26, 2004 between solicitors and client containing information and instructions from client to solicitor, legal advice from solicitor to client, as well as e-mails between solicitors of the OAG containing legal advice all communicated for the purpose of soliciting and rendering a legal opinion on the content of the MEC.
- (3) Solicitors' hand written notes dated October 20, 2004 pertaining to meeting between solicitors held in relation to rendering a legal opinion on the content of the MEC.
- (4) Solicitor's hand-written notes pertaining to legal opinion on the content of the MEC.
- (5) Background information either provided by client to solicitor or compiled by solicitor for the purpose of providing a legal opinion on the content of the MEC.

Legal Services Files

- (1) Requests for legal advice made by clients to solicitors

- (2) Various background information contained in documents and e-mails sent by clients to solicitor with or further to requests for legal advice.
 - (3) Legal opinion dated April 28, 2004 from solicitor to client.
 - (4) E-mail dated May 28, 2004 from client to solicitor regarding and reflecting the legal opinion dated April 28, 2004.
 - (5) E-mail dated June 1, 2004 from client to solicitor forwarding a copy of interdepartmental memorandum that, in part, is based on and reflects the legal opinion dated April 28, 2004; interdepartmental memorandum also constituting opinion or recommendation to Minister or the Executive Council for the purpose of section 6 (g) of the *Right to Information Act*.
 - (6) Court decisions researched and compiled by solicitor in rendering the legal opinion dated April 28, 2004.
6. In most Canadian jurisdictions, the Minister of Justice is the Minister responsible for the Human Rights Act. The practice in New Brunswick is exceptional in that here the Code falls under the legislative responsibility of the Minister of Post Secondary Education, Training and Labour. It is possible that the requester mistakenly believed that the Minister of Justice here had legislative responsibility for this file as is often the case elsewhere in Canada. Though he was invited to check with the appropriate Minister, the closing paragraph was not clear enough, in my view, to meet the Minister's obligation of notification as required under subsection 3(4) of the Act. Subsection 3(4) provides as follows:
 - 3(4) Where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.
7. Section 3(4) was not set out in the Minister's letter along with the other applicable provisions of the Act. Based upon the wording of the ultimate paragraph in the Minister's letter I conclude that the Minister did not turn his mind to the requirements of section 3(4) in responding to the requester. Even with respect to the claim of solicitor client privilege that is invoked it would be customary for the solicitors involved to check with their client and obtain instructions as to whether the privilege should be claimed or waived. There is nothing in the record before me which would allow me to conclude that any instructions were sought or given. That may very well have happened, but as section 12 of the Act places the onus of proving the exemptions claimed upon the Minister, some proof of such instructions must be advanced in the context of an Ombudsman review.
8. In general any claim of solicitor client privilege in the context of an Ombudsman review should be advanced on the basis of an affidavit from the client asserting the privilege vis-à-vis the particular access request and identifying with sufficient

precision the records with respect to which the privilege is claimed. There is of course no privilege with respect matters that are not “legal opinions or advice” or “privileged communications as between solicitor and client” within the meaning of the statute. As McNair and Woodbury cite in their text Government Information: Access and Privacy Thomson Carswell, p. 3-44, on this topic:

An institution must also sever and disclose general identifying information relating to a communication that it claims was for the purpose of obtaining or providing legal advice, such as a general description of the communication, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block. This kind of information will enable the requester to know that a communication occurred between certain persons at a certain time on a certain subject, but no more.”

9. The appropriate Minister to respond to the petitioner’s request and the authority that may waive or invoke privilege over the documents in the Attorney General’s files is the Minister of Post Secondary Education, Training and Labour. That Minister will undoubtedly have several other responsive records which may be available to the petitioner and may elucidate his request. A more detailed notice to that effect should have been given the petitioner in the Minister’s response last February.
10. Much of the information which the requester seeks may be available to him in explanatory notes accompanying the amending bill, or consultation documents prepared by the department or the Human Rights Commission and a diligent search for records may give the petitioner full satisfaction even without waiver of the privilege. If not, the Minister may find that owing to the importance of the fundamental rights set out in the legislative amendments that the privilege should, exceptionally, be waived in this case and that in the public interest the legislative development process regarding these amendments deserves full transparency. At the very least, documents described as “background information” could for example be severed from and provided to the applicant. On one analysis the scope of solicitor client privilege may be broad enough to encompass these notes within the privilege. On an information rights analysis the Minister must determine whether disclosure of such records would breach the privilege in any material way, and if so does the interest in transparency outweigh the privilege. If the law of solicitor client privilege is to have any teeth, both these issues should be easily amenable to independent verification, otherwise the integrity of the privilege is lost.
11. **I recommend that the Minister cooperate with the Minister of Post Secondary Education, Training and Labour in order to expedite a more fulsome and informative response to the petitioner.**
12. In closing I wish also to formally disassociate myself from the Attorney General’s recent view regarding the disclosure of solicitor client records to my office in the exercise of an *in camera* review under section 7(4) of the Act. In this case the

Attorney General refused at this stage to open his files for inspection and supplied instead the written, unsworn, description of records reproduced above. While it is not necessary at this stage to verify that claim of privilege, suffice it to say, that if it were necessary to do so the Minister's general description of the records, and in particular paragraph (5) of the Legislative Services records identified and paragraph (2) of the Legal Services records are wholly inadequate to the task at hand. They are altogether insufficient to allow the Ombudsman to verify the claim as is required by the Act.

13. In my view it is premature to entertain this objection since the matter must first be referred to the appropriate Minister, and I refrain from making any detailed analysis of this point of procedure at the current time. It is however, I note, a departure from long standing practice and one which may unnecessarily complicate the review process under the *Right to Information Act*. Two factors which have influenced the Attorney General's position are without doubt i) recent amendments to the *Ombudsman Act* which have added a new exemption to the Ombudsman's broad powers to order production of records, and which favour the protection of solicitor client records; and ii) the recent decision of the Federal Court of Appeal in *Blood Tribe v. Privacy Commissioner of Canada* where the appeal court reversed the Trial Division and refused the Privacy Commissioner the right to access solicitor client records for the purpose of verifying a claim of privilege in a matter before her.
14. The Supreme Court of Canada has granted leave to appeal in the *Blood Tribe* matter and my Office has sought leave to intervene in favour of the Commissioner's case. As to the amendments to the *Ombudsman Act*, it was certainly not anticipated that they were meant to limit in any way the Ombudsman's role or right of review under the *Right to Information Act*. It is indeed regrettable that the current wording of the *Right to Information Act* leaves any room for doubt on this point, and still more surprising that lawyers in the Attorney General's Office were so quick to offer up such a restrictive interpretation. The Attorney General's case is hardly strengthened by reference to the factual context, since essentially in this case the privilege is being invoked to prevent independent verification of a claim of privilege asserted against a citizen who merely asked to know the legislative history of a newly proclaimed right, a fundamental right to equality without discrimination on the basis of political belief or activity. It is difficult to imagine a weaker factual context to support the Attorney General's proposition.
15. **Fortunately, the Legislature will have an early opportunity to correct the matter when new access and privacy legislation is adopted in this province in the coming months. I strongly recommend that at that time the Legislature enact provisions clarifying and confirming the Ombudsman's, or the designated review officer's, authority to view solicitor client records for the purpose of verifying a claim of privilege under the *Right to Information Act*.**

Bernard Richard, Ombudsman
October 12, 2007